

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

Raymond James Mercado,	)	C/A No. 0:14-1273-JMC-PJG
	)	
Petitioner,	)	
	)	<b>REPORT AND RECOMMENDATION</b>
v.	)	
	)	
Kenny Atkinson, Warden,	)	
	)	
Respondent.	)	
	)	

The petitioner, Raymond James Mercado (“Petitioner”), a self-represented prisoner confined at Federal Correctional Institution (“FCI”) Edgefield, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. This matter is before the court pursuant to 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2)(c) DSC. Having reviewed the Petition in accordance with applicable law, the court concludes that it should be summarily dismissed.

**I. Factual and Procedural Background**

Petitioner alleges that he entered a guilty plea to a drug offense and was sentenced to 140 months’ imprisonment by this court on December 6, 2011. (ECF No. 1 at 1-3.) Petitioner claims that he requested an appeal; however, his attorney never filed one.<sup>1</sup> (Id. at 4.) Petitioner indicates that he has not filed a motion under 28 U.S.C. § 2255 challenging his conviction or sentence. (Id.)

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<sup>1</sup> A court may take judicial notice of its own records. See Colonial Penn Ins. Co. v. Coil, 887 F.2d 1236, 1239 (4th Cir. 1989) (“We note that ‘[t]he most frequent use of judicial notice of ascertainable facts is in noticing the content of court records.’”) (citation omitted). Therefore, the court takes judicial notice of Petitioner’s criminal case, United States v. Raymond James Mercado, C/A No. 4:11-cr-416-TLW-10 (D.S.C. Mar. 22, 2011), which reflects that Petitioner signed a document on December 6, 2011, indicating that he did not wish to file an appeal. Id. at ECF No. 513.

As relief, Petitioner seeks an evidentiary hearing to allow him “to state his claim in open court concerning the effectiveness of his lawyer.” (Id. at 9.)

## II. Discussion

### A. Standard of Review

Under established local procedure in this judicial district, a careful review has been made of the *pro se* Petition pursuant to the Rules Governing § 2254 Cases,<sup>2</sup> 28 U.S.C. § 2254; the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Pub. L. No. 104-132, 110 Stat. 1214; and in light of the following precedents: Denton v. Hernandez, 504 U.S. 25 (1992); Neitzke v. Williams, 490 U.S. 319, 324-25 (1989); Haines v. Kerner, 404 U.S. 519 (1972); Nasim v. Warden, Md. House of Corr., 64 F.3d 951 (4th Cir. 1995) (en banc); Todd v. Baskerville, 712 F.2d 70 (4th Cir. 1983).

This court is required to liberally construe *pro se* petitions. Erickson v. Pardus, 551 U.S. 89 (2007). *Pro se* petitions are held to a less stringent standard than those drafted by attorneys, id.; Gordon v. Leeke, 574 F.2d 1147, 1151 (4th Cir. 1978), and a federal district court is charged with liberally construing a petition filed by a *pro se* litigant to allow the development of a potentially meritorious case. Hughes v. Rowe, 449 U.S. 5, 9 (1980); Cruz v. Beto, 405 U.S. 319 (1972). When a federal court is evaluating a *pro se* petition the petitioner’s allegations are assumed to be true. Erickson, 551 U.S. at 93 (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-56 (2007)).

However, the requirement of liberal construction does not mean that the court can ignore a clear failure in the pleading to allege facts which set forth a claim currently cognizable in a federal

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<sup>2</sup> The Rules Governing Section 2254 are applicable to habeas actions brought under § 2241. See Rule 1(b).

district court. Weller v. Dep't of Soc. Servs., 901 F.2d 387 (4th Cir. 1990). The mandated liberal construction afforded to *pro se* pleadings means that if the court can reasonably read the pleadings to state a valid claim on which the petitioner could prevail, it should do so; however, a district court may not rewrite a petition to include claims that were never presented, Barnett v. Hargett, 174 F.3d 1128 (10th Cir. 1999), construct the petitioner's legal arguments for him, Small v. Endicott, 998 F.2d 411 (7th Cir. 1993), or "conjure up questions never squarely presented" to the court, Beaudett v. City of Hampton, 775 F.2d 1274, 1278 (4th Cir. 1985).

## **B. Analysis**

The instant Petition, filed pursuant to 28 U.S.C. § 2241, is subject to summary dismissal because "it is well established that defendants convicted in federal court are obliged to seek habeas relief from their convictions and sentences through § 2255." Rice v. Rivera, 617 F.3d 802, 807 (4th Cir. 2010) (citing In re Vial, 115 F.3d 1192, 1194 (4th Cir. 1997)). Petitioner cannot challenge his federal conviction and sentence under § 2241 unless he can satisfy the § 2255 savings clause, which states:

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

28 U.S.C. § 2255(e); see also Reyes-Requena v. United States, 243 F.3d 893, 901 (5th Cir. 2001); Ennis v. Olsen, No. 00-7361, 2000 WL 1868982, at \*1 (4th Cir. Dec. 22, 2000). In this case, Petitioner states that he has not filed a motion under § 2255. However, "the remedy afforded by § 2255 is not rendered inadequate or ineffective merely because an individual has been unable to

obtain relief under that provision, or because an individual is procedurally barred from filing a § 2255 motion.” See In re Vial, 115 F.3d at 1194 n.5 (citations omitted).

Additionally, Petitioner fails to satisfy criteria set forth by the United States Court of Appeals for the Fourth Circuit to determine whether a § 2255 motion would be inadequate or ineffective to test the legality of a prisoner’s detention. In In re Jones, 226 F.3d 328 (4th Cir. 2000), the court held that a petitioner must show:

(1) at the time of conviction, settled law of this circuit or the Supreme Court established the legality of the conviction; (2) subsequent to the prisoner’s direct appeal and first § 2255 motion, the substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal; and (3) the prisoner cannot satisfy the gatekeeping provisions of § 2255 because the new rule is not one of constitutional law.

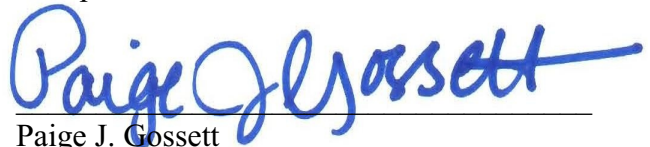
In re Jones, 226 F.3d at 333-34. The instant Petition fails to demonstrate that the conduct for which Petitioner was convicted has been deemed non-criminal by any substantive law change. Instead, Petitioner alleges actual innocence of a firearm sentence enhancement “because he was not put on notice concerning any firearm count.” (ECF No. 1 at 8.) However, the Fourth Circuit has not extended the reach of the savings clause to petitioners who challenge only their sentences. See United States v. Poole, 531 F.3d 263, 267 n.7 (4th Cir. 2008); Farrow v. Revell, No. 13-6804, 2013 WL 5546155 (4th Cir. Oct. 9, 2013) (challenge to sentencing factor is not cognizable under § 2241); see also Whiteside v. United States, No. 13-7152, 2014 WL 1364019, at \*27 n.4 (4th Cir. Apr. 8, 2014) (noting that the Eleventh Circuit recently permitted a federal inmate to challenge the legality of a sentence under § 2241, but “expressly” refusing to decide whether the savings clause might justify relief from a sentencing error through a § 2241 petition in this Circuit). As Petitioner has not

shown that a motion filed pursuant to § 2255 is inadequate or ineffective to test the legality of his conviction or sentence, this matter should be dismissed.

Petitioner is beyond the one-year statute of limitations for filing a § 2255 motion in the sentencing court. See 28 U.S.C. § 2255(f). Therefore, the court concludes that it is not in the interest of justice to re-characterize the Petition as a § 2255 motion. Cf. United States v. McNeill, No. 12-6129, 2013 WL 1811904, at \*5 (4th Cir. May 1, 2013) (finding transfer of an improperly filed petition in the interest of justice where summary dismissal would “bar a petitioner from pursuing his habeas rights” due to the statute of limitations) (citing Shaw v. United States, No. 09-8186, 2011 WL 915814 (4th Cir. March 17, 2011)).

### **III. Conclusion**

Accordingly, the court recommends that the Petition in the above-captioned case be dismissed without prejudice and without requiring the respondent to file a return.



Paige J. Gossett

UNITED STATES MAGISTRATE JUDGE

May 29, 2014  
Columbia, South Carolina

*The parties' attention is directed to the important notice on the next page.*

### **Notice of Right to File Objections to Report and Recommendation**

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. “[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must ‘only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.’” Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee’s note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); see Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk  
United States District Court  
901 Richland Street  
Columbia, South Carolina 29201

**Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation.** 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140 (1985); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984).